

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED

MAR 04 2009

[Signature]
CLERK

UNITED STATES OF AMERICA

CR 06-10023-01

Plaintiff,

-VS-

ORDER DENYING
CERTIFICATE OF APPEALABILITY

JAMES JOHNSON, III,

Defendant.

TO THE EIGHTH CIRCUIT COURT OF APPEALS:

Defendant pleaded guilty to conspiracy to distribute and possession with intent to distribute methamphetamine and was sentenced on June 4, 2007, to 188 months custody. Defendant filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The basis of defendant's motion was his contention that I erred in applying a two level sentencing guidelines enhancement for possession of a firearm. He also contended that counsel was ineffective in erroneously advising the defendant to enter into a plea agreement which included a waiver of his right to appeal his sentence, including the firearm enhancement. I summarily denied the motion to vacate pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

Defendant has filed a notice of appeal. The notice of appeal may be treated as an application for a certificate of appealability. Tiedeman v. Benson, 122 F.3d 518 (8th Cir. 1997). Pursuant to 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Defendant did not and has not made a substantial showing of the denial of a constitutional right.

IT IS HEREBY CERTIFIED that there does not exist probable cause of an appealable issue with respect to the Court's order denying defendant's § 2255 motion. Defendant's

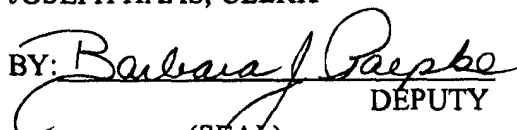
application for a certificate of appealability is denied. This in no way hampers the defendant's ability to request issuance of the certificate by a circuit judge pursuant to Fed. R. App. P. 22.

Dated this 3rd day of March, 2009.

BY THE COURT:


CHARLES B. KORNMAN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 
DEPUTY
(SEAL)